

Congress of the United States

Washington, DC 20510

February 26, 2016

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Ms. Heather McTeer Toney
Regional Administrator, Region 4
Environmental Protection Agency
Atlanta Federal Center
61 Forsyth Avenue, SW
Atlanta, GA 30303

Dear Madam Administrator and Ms. Toney:

We write to express serious concern regarding the Environmental Protection Agency's (EPA) administration of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), otherwise known as Superfund. In particular, EPA's designation of "potentially responsible parties" (PRPs) through an "air deposition" theory of liability appears to rest on questionable legal authority and may set a troubling precedent for all facilities in the United States which generate air emissions subject to the Clean Air Act and other relevant statutes.

As you are aware, on September 22, 2014, EPA proposed placing the 35th Avenue site in North Birmingham on the National Priorities List. According to the EPA Hazard Ranking System record that accompanied the proposal, "[a]ir is the primary source of deposition within the 35th Avenue site . . . from smokestacks and windblown particles from process fines and other stockpiled material." In conjunction with this air deposition theory, the agency has designated several facilities as PRPs and has informed the facilities that they may be forced to undertake cleanup actions or incur financial liability for costs associated with any cleanup of the site.

We are mindful of EPA's repeated attempts to increase the scope of federal regulatory authority, and we fear the application of the air deposition theory to supposed "arrangers" under CERCLA represents a significant expansion of the agency's Superfund enforcement powers. Arranger liability attaches to any person who disposes of hazardous substances,¹ with "disposal" defined as the "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste *into or on any land or water* so that such solid waste or hazardous waste or any

¹ 42 U.S.C. § 9607(a)(3).

constituent thereof may enter the environment or be *emitted into the air* or discharge into any waters.”²

A plain reading of this definition demonstrates that, to the extent air emissions may be a factor in determining arranger liability, such emissions must result directly from the discharge of solid or hazardous waste directly into or onto any land or water. In other words, industrial air emissions from lawful sources are to be regulated under the Clean Air Act, not CERCLA. However, EPA seems intent on pressing the air deposition theory in North Birmingham, while having also endorsed the theory in an amicus curiae brief filed recently in the Ninth Circuit Court of Appeals. EPA’s legal positions raise serious questions regarding the agency’s understanding of its statutory authority.

Similar reservations are expressed in the enclosed resolution, adopted jointly by the Alabama House of Representatives and Alabama Senate and approved by the Governor of Alabama on June 9, 2015. The resolution describes the 35th Avenue site proposal and provides that EPA is “attempting to impose a novel and overbroad ‘air deposition’ theory of Superfund liability which would allow EPA to pursue industrial facilities for contamination at non-contiguous properties on the basis of air emissions which are subject to the federal Clean Air Act and authorized by a valid air operating permit.” The resolution notes further that EPA’s “broad air deposition theory would allow EPA to order businesses to clean up hazardous contamination within an indefinite area before proving that the business was actually responsible.” Thus, we are especially concerned with the due process implications associated with this charge.

The resolution also suggests that EPA is pursuing the air deposition theory “as an illicit means for funding policy initiatives which are outside its regulatory authority.” Indeed, the 35th Avenue site proposal appears to be part of an “environmental justice” initiative for EPA to become a *de facto* redevelopment authority in Birmingham.³ Tellingly, the proposal follows a 2011 planning document in which EPA announced its intent to “go beyond traditional injunctive relief to stop illegal pollution . . . and, where appropriate and agreed to by defendants, to include Supplemental Environmental Projects . . . that provide benefits to communities,” as well as to “leverage benefits resulting from enforcement activities.”⁴

Finally, the resolution describes prior objections to the 35th Avenue site proposal from the Alabama Attorney General and Alabama Department of Environmental Management (ADEM). For example, ADEM repeatedly informed EPA that it did not concur with the proposed listing, as the Attorney General explained in a letter provided

² *Id.* § 6903(3) (emphasis added).

³ See Environmental Protection Agency, Region 4 Superfund, Annual Report, FY 2014 at 5.

⁴ Environmental Protection Agency, *Plan FJ 2014: Advancing Environmental Justice Through Compliance and Enforcement* (Sept. 2011).

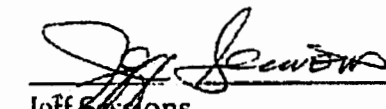
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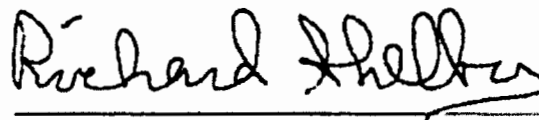
to EPA on January 20, 2015. Under the 1997 "Fields Memorandum," ADEM's decision to withhold concurrence required EPA to work closely with the State of Alabama prior to formally proposing a site for the National Priorities List. Yet the Attorney General's comment letter indicates that EPA neglected to follow the procedure outlined in the Fields Memorandum, suggesting agency disregard for state coordination and input during the site proposal process.


EPA's air deposition theory and corresponding proposal to place the 35th Avenue site on the National Priorities List raise important legal and scientific questions and present substantial risk for businesses that may have little to no responsibility for site contamination. For these reasons, the state Legislature, Governor, and Attorney General for Alabama have each requested EPA to reconsider its position.

We believe these requests are justified, and we urge EPA to give them careful attention. Furthermore, so that we may confirm the agency's appropriate understanding of CERCLA and related legal authorities, we request your staff to schedule a meeting with our offices at the earliest opportunity to discuss the concerns raised above and in the enclosed resolution.

Yours very truly,


Jeff Sessions
United States Senator


Richard Shelby
United States Senator


Gary Palmer
United States Representative

cc: Sen. James M. Inhofe, Chairman, Committee on Environment and Public Works
Sen. Thad Cochran, Chairman, Committee on Appropriations
Sen. M. Michael Rounds, Chairman, Subcommittee on Superfund, Waste Management, and Regulatory Oversight, Committee on Environment and Public Works
Sen. Lisa Murkowski, Chairman, Subcommittee on the Interior, Environment, and Related Agencies, Committee on Appropriations

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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MAR 29 2016

The Honorable Jeff Sessions
United States Senate
Washington, D.C. 20515

Dear Senator Sessions:

Thank you for your February 26, 2016, letter to the U.S. Environmental Protection Agency's Administrator, Gina McCarthy, and myself regarding the 35th Avenue Superfund Site (Site) located in Birmingham, Jefferson County, Alabama. We appreciate your attention to this issue, as well as that of the State of Alabama (State). Based on our reading of your letter, we understand you to be raising three concerns related to the EPA's proposed listing of the Site on the National Priorities Listing (NPL) pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund): (1) the Agency's designation of Potentially Responsible Parties (PRPs) through an "air deposition" theory of liability; (2) the Agency's efforts related to environmental justice; and (3) the Agency's coordination with the State prior to and following proposal of the Site to the NPL.

The EPA believes that it is critical that the State and all of the parties involved understand that the listing of a site on the NPL and enforcement against PRPs under any type of liability theory are separate and distinct activities based on different authorities under Superfund. Superfund liability is not considered when evaluating a site for listing on the NPL, nor is liability established or apportioned based on the decision to propose or finalize a site on the NPL.

With respect to your concerns about the EPA's enforcement approach and/or theories of liability against any PRP associated with the Site, unfortunately the EPA cannot engage in any level of discussions with third parties, including members of Congress, as articulated in the Memorandum from Granta Y. Nakayama, dated March 8, 2006, and titled "Restrictions on Communicating with Outside Parties Regarding Enforcement Actions" <https://www.epa.gov/enforcement/restrictions-communicating-outside-parties-regarding-enforcement-actions>. However, I am able to address the remaining concerns raised in your letter, as well as any additional questions you may have regarding the environmental conditions and the EPA response efforts to date at the Site.

On September 22, 2014, the EPA proposed to include the 35th Avenue Site on the NPL. The identification of sites for listing on the NPL is intended to guide the EPA in: a) determining which sites warrant further investigation to assess the nature and extent of the human health and environmental risks associated with a site; b) identifying what CERCLA-financed remedial actions may be appropriate; c) notifying the public of sites the EPA believes warrant further investigation; and d) serving notice to PRPs that the EPA may initiate CERCLA-financed remedial action. As the D.C. Circuit Court of Appeals has held, the NPL serves primarily as an informational tool for use by the EPA in identifying, quickly and inexpensively, those sites that appear to present a significant risk to public health or the environment. See *CTS Corp. v. EPA*, 759 F.3d 52, 56 (D.C. Cir. 2014); *Carus Chem. Co. v. EPA*, 395 F.3d 434, 441 (D.C. Cir. 2005); *Wash. State Dep't of Transp. v. EPA*, 917 F.2d 1309, 1310 (D.C. Cir. 1990).

In order to determine whether a site may be proposed or added to the NPL, the EPA uses the Hazard Ranking System (HRS). Sites that score greater than 28.50 based on the HRS are eligible for the NPL. The HRS score

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scientifically reflects an assessment of the relative threat to human health and the environment posed by the release or threatened release of hazardous substances at a site. The 35th Avenue site's score at the time of proposal to the NPL was 50.00. Consistent with CERCLA, this score relied solely on the Site's soil exposure pathway, due to widespread soil contamination in the residential neighborhoods of Fairmont, Collegeville and Harriman Park. This was based on results of sampling events conducted in 2013 and 2014 in these neighborhoods that revealed elevated concentrations of lead, arsenic and Benzo (a) pyrene. Environmental justice concerns are not a part of a site's HRS score or used to qualify a site for NPL listing.

In the HRS supporting materials the EPA identified several facilities as the possible sources of contamination detected in residential soil due to their proximity to the Area of Contamination (AOC), the type of plant, the processes utilized at the plant, and the history of releases contributing to the commingled contamination of the AOC over the period of many years. Identification of potential sources of contamination is a typical part of HRS supporting materials. This does not, however, establish liability. Liability is established at a site through a separate process using different CERCLA authorities. While the Agency's investigation is still underway, the presence of contaminants in the residential neighborhoods is potentially due to a number of routes, including use of solid waste as fill material, storm water runoff from facilities, continued migration of contaminants from frequent flooding in the area, and facility air emissions. These emissions occurred prior to, in absence of or in exceedance of Clean Air Act permits.

A public comment period on the proposed NPL listing was held from September 22, 2014 to January 22, 2015. The EPA received numerous public comments both in support and in opposition to a final listing, including letters from the Alabama Department of Environmental Management (ADEM) and the Alabama Attorney General. In those letters, the State requested review of the EPA's decision through the dispute resolution process outlined in the July 25, 1997 OSWER memorandum titled, "Coordinating with the States on National Priorities List Decisions – Issue Resolution Process." Prior to making a final listing decision, the EPA must consider all comments received on a proposed NPL site and respond to significant comments in writing. After consideration of all comments, if the Site still qualifies for listing on the NPL, the EPA will welcome informal deliberations with ADEM. Depending on the outcome of those deliberations, as appropriate, the EPA will follow the process outlined in the above "Issue Resolution Process" memorandum. The EPA is committed to consultations with the State prior to making any future decision, for example, to add the Site on the NPL through a final rule, to pursue additional cleanup approaches, or to withdraw the proposal to list the Site.

I believe that we share the common goal to protect and improve the quality of life for Alabama residents. As such, the EPA welcomes any further discussions on the proposed listing of the 35th Avenue site on the NPL or any other issues related to the environmental conditions and ongoing EPA response efforts at the Site. I have directed my staff to arrange for a meeting with your office at your earliest convenience. If you have additional questions please contact Allison Wise at (404) 562-8327.

Sincerely,



Heather McTeer Toney
Regional Administrator

cc: Mathy Stanislaus, OLEM

Franklin Hill, Superfund Division